

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

May 27, 1994

UNITED STATES OF AMERICA,)	
Complainant,)	
)	
v.)	8 U.S.C. 1324c Proceeding
)	OCAHO Case No. 94C00042
FELICIANO AGUAS-AVALOS,)	
Respondent.)	
_____)	

ORDER DENYING RESPONDENT'S MOTION FOR A MORE
DEFINITE STATEMENT

On September 8, 1993, complainant, acting by and through the Immigration and Naturalization Service (INS) commenced this action by serving a three-count Notice of Intent to Fine (NIF) KAN-274C-93-0013, against Feliciano Aguas-Avalos (respondent).

In Count I of the NIF, complainant asserted that respondent used, possessed, and obtained a counterfeited Resident Alien Card, Form I-551, number A042336545, after November 29, 1990, knowing that such document was forged, counterfeit, altered, and falsely made, for the purpose of satisfying a requirement of the Immigration and Nationality Act (INA), in violation of the INA, 8 U.S.C. § 1324c(a)(2). Complainant assessed a civil money penalty of \$400 for this alleged violation.

In Count II, complainant alleged that respondent possessed a forged, counterfeited, altered and falsely made Social Security Card, number 506-27-1954, after November 29, 1990, knowing that that document was forged, counterfeit, altered, and falsely made, for the purpose of satisfying a requirement of the INA, in violation of the INA, 8 U.S.C. § 1324c(a)(2). Complainant assessed a civil money penalty of \$400 for the violation alleged in Count II.

In Count III, complainant alleged that respondent forged, counterfeited, altered, and falsely made an Employment Eligibility

Verification Form (Form I-9), after November 29, 1990, knowing that that document was forged, counterfeit, altered, and falsely made, for the purpose of satisfying a requirement of the INA, in violation of the INA, 8 U.S.C. § 1324c(a)(1). Complainant assessed a civil money penalty of \$400 for the alleged violation contained in Count III.

In the NIF, respondent was advised of his right to contest those charges by timely submitting a written request for a hearing before an administrative law judge assigned to this office. By letter dated October 1, 1993, Roberta F. Farrell, Esquire, filed a request for hearing on respondent's behalf.

On March 11, 1994, complainant filed the two-count Complaint at issue with this Office.

In Count I of the Complaint, complainant alleged that respondent used, attempted to use, possessed, obtained, accepted, and received a forged, counterfeited, altered, and falsely made Resident Alien Card, Form I-551, number A042336545, in the name "Aguas Avalos, Feliciano" with the expiration date of "05 29 01", after November 29, 1990, knowing that such document was forged, counterfeit, altered, and falsely made, for the purpose of satisfying a requirement of the INA, in violation of the INA, 8 U.S.C. § 1324c(a) (2). Complainant assessed a civil money penalty of \$400 for the violation alleged in Count I.

In Count II, complainant alleged that respondent forged, counterfeited, altered, and falsely made an Employment Eligibility Verification Form (Form I-9), dated "8-9-93", in the name "Feliciano Aguas", for the Butterball Turkey Company, 411 N. Main, Carthage, MO 64836, after November 29, 1990, knowing that that document was forged, counterfeit, altered, and falsely made, for the purpose of satisfying a requirement of the INA, in violation of the INA, 8 U.S.C. § 1324c(a)(1). A civil money penalty of \$400 was assessed by complainant for the alleged violation contained in Count III.

On April 11, 1994, respondent's counsel filed a letter with this Office requesting an extension of time in which to file an answer to the Complaint. Because respondent's counsel's request was unopposed by complainant's counsel, that request was granted by the undersigned, and the filing deadline extended to May 13, 1994.

On May 12, 1994, respondent filed his Answer, denying therein complainant's allegations that he violated the INA, and asserting six (6) affirmative defenses.

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As a first affirmative defense, respondent asserted that the investigation and acts leading up to the commencement of these proceedings were not conducted in accordance with 8 C.F.R. section 270.2, in that the INS neither initiated the investigation on its own nor upon receipt of a written complaint by a reliable third party, which, respondent asserted, violates the enforcement procedure provisions of the regulation, and is violative of respondent's constitutional protections.

As a second affirmative defense, respondent asserted that the investigation and acts leading to the commencement of these proceedings violate Section 1324(d)(3) of the INA, in that such procedures constitute a major change in enforcement procedures without complying with the requisite provisions of the INA.

As a third affirmative defense, respondent asserted that a Form I-9 is not a document for purposes of 8 U.S.C. § 1324c.

As a fourth affirmative defense, respondent contended that the act of completing a Form I-9 cannot constitute the act of forging, counterfeiting, altering, or falsely making a document as contemplated under the INA, as alleged in Count II.

As a fifth affirmative defense, respondent asserted that the Complaint fails to state a claim against respondent in that the acts complained of are not prohibited under 8 U.S.C. § 1324c, and are therefore not within the scope of the statute.

As a sixth affirmative defense, respondent asserted that, even if it were concluded that his conduct violated 8 U.S.C. § 1324c, he obtained permanent resident status on May 30, 1992, and is currently a permanent resident of the United States, is the fiance of a United States citizen, and soon will be the father of a United States citizen, and is therefore eligible for a waiver of excludability.

On May 12, 1994, respondent also filed a Motion for a More Definite Statement, in which he moved, pursuant to Rule 12(e) of the Federal Rules of Civil Procedure, for a more definite statement with respect to Count I in the Complaint.

In support of its motion, respondent made the following verbatim assertions:

1. In Count 1A of the Complaint, the Complainant alleges that Respondent "used, attempted to use, possessed, obtained, accepted, and received a counterfeited resident alien card." It is unclear whether the Complainant alleges that the alien resident card was or was not that card issued to Respondent. Respondent is uncertain whether the Complainant claims that the Respondent used the card, attempted to use the card, possessed the card, obtained the card, accepted the card, or received the card or whether Complainant alleges the totality of those acts as encompassed by use of the word "and" in the Complaint.
2. The Complaint alleges in Count 1D that the Respondent performed such acts for the purpose of satisfying the requirements of the Immigration and Nationality Act. The Complainant does not state what requirement of the Immigration and Nationality Act the Respondent sought to satisfy by the alleged conduct.
3. Clarification of these allegations is critical to allow the Respondent to prepare and present his affirmative defenses. Section 1324c(a)(2) prohibits specific conduct which may be performed by an individual but does not encompass all conduct which may be performed by an individual. Specifically, the conduct prohibited in this section is directed to such conduct which satisfies a requirement of the Immigration and Nationality Act.

Respondent speculates that employment may be the act complained of in Count 10 (sic). If so, Respondent will assert that employment is not a benefit under the Act. However, Respondent's assertions would be premature until the Service specifies the alleged benefit obtained.

Unless and until the Complainant comes forward to make more definite the cause of action underlying this complaint, the Respondent is unable to present affirmative defenses which may be available to him.

On May 25, 1994, complainant filed an opposition pleading to respondent's motion, asserting therein that the allegations set out in the Complaint clearly allege a violation of law and also provide a clear and concise statement of the facts relative to each violation.

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There is no specific provision in the procedural regulations governing these proceedings providing for motions for a more definite statement. However, the procedural regulations do provide that:

(t)he Rules of Civil Procedure for the District Courts of the United States may be used as a general guideline in any situation not provided for or controlled by these rules, the Administrative Procedure Act, or by any other applicable statute, executive order, or regulation.

28 C.F.R. § 68.1.

Rule 12(e) of the Federal Rules of Civil Procedure provides, in pertinent part:

If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, the party may move for a more definite statement before interposing a responsive pleading. The motion shall point out the defects complained of and the details required.

Motions for a more definite statement under Rule 12(e) are generally disfavored in light of the liberal discovery available under the federal rules. Resolution Trust Corp. v. Thomas, 837 F. Supp. 354, 356 (D. Kan. 1993); Resolution Trust Corp. v. Gershman, 829 F. Supp. 1095, 1103 (E.D. Mo. 1993); Geir v. Educational Serv. Unit No. 16, 144 F.R.D. 680, 685 (D. Neb. 1992); Prudhomme v. Procter & Gamble Co., 800 F. Supp. 390, 396 (E.D. La. 1992); Oceanic Cablevision, Inc. v. M.D. Elecs., 771 F. Supp. 1019, 1022 (D. Neb. 1991).

The purpose of the rule is to enable the movant to prepare a responsive pleading by guaranteeing adequate notice of the opposing claims or contentions. Armstrong v. Snyder, 103 F.R.D. 96, 100 (E.D. Wis. 1984). Accordingly, Rule 12(e) motions are properly granted only when the pleading addressed is so vague that the movant is unable to determine the issues to which he must respond. Thomas, 837 F. Supp. at 356; Prudhomme, 800 F. Supp. at 396; Cox v. Maine Maritime Academy, 122 F.R.D. 115 (D. Me. 1988); School Dist. of Kansas City v. State of Missouri, 460 F. Supp. 421, 444 (W.D. Mo. 1978).

Furthermore, where the information sought by the movant is available or properly sought through discovery, the Rule 12(e) motion should be denied. Oceanic Cablevision, 771 F. Supp. at 1022; Zamora v. Massey-Ferguson, 336 F. Supp. 588, 592 (S.D. Iowa 1972).

Respondent fails to meet this standard.

First, the Complaint is not so vague that no response can be filed thereto. To the contrary, respondent has filed an Answer, denying complainant's allegations of violation and asserting six affirmative defenses thereto. See Prudhomme, 800 F. Supp. at 396.

Second, in recent determinations by this office, it has been held that pleadings similar to those contained in the Complaint alleging violations of the document fraud provisions of the INA, 8 U.S.C. § 1324c, were not vague, but rather contained "a clear and concise statement" of the facts alleged. See United States v. Makilan, 4 OCAHO 610 (2/14/94); United States v. Villatoro-Guzman, 3 OCAHO 540 (7/22/93).

Respondent may, through discovery, seek to narrow the issues in this matter. However, because the allegations contained in the Complaint are sufficiently precise to put respondent on notice of the nature of the claims asserted and to enable respondent to prepare a responsive pleading, Respondent's Motion for a More Definite Statement is ordered to be and is denied.

A telephonic prehearing conference will be scheduled shortly for the purpose of selecting the earliest mutually convenient date upon which this matter can be set for hearing.

In accordance with the INA, 8 U.S.C. § 1324c(d)(2)(B), and the pertinent procedural regulation, 28 C.F.R. section 68.5(b), that hearing will be held at the nearest practicable place to the place where respondent resides or to the place where the alleged violation occurred.

JOSEPH E. MCGUIRE
Administrative Law Judge